RE AZRIN M KAMALUDDIN; EX P STANDARD CHARTERED BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[BANKRUPTCY NO: D8-29-789-2005]
9 JULY 2007

BANKRUPTCY: *Notice - Validity - Whether judgment creditor authorised to request for issuance of notice - Whether onus on judgment creditor to furnish proof of authority - Whether s. 133 Bankruptcy Act 1967 to be complied with - Whether Court of Appeal decision in UMW Industries (1985) Sdn Bhd v. Lim Chee Hian distinguished*

This was an appeal by the judgment debtor ('JD') against the decision of the senior assistant registrar ('SAR') dismissing the JD's application to set aside the bankruptcy notice ('BN') issued against him. The JD submitted that the BN was invalid for non-compliance with s. 133 of the Bankruptcy Act 1967 as the judgment creditor ('JC') failed to furnish proof of authority to request for the said BN and despite there being a challenge by the JD to do so.

Held (dismissing the JD's appeal):

(1) The JC's general manager, Puan Normaziah, had stated in Form 4 of the Bankruptcy Rules 1969 that she was authorised under the seal of the company to sign the request for the issuance of the BN. That was sufficient to cause the SAR to issue the BN. The onus was not on the petitioner to prove that he was duly authorised. One must appreciate that the proceedings were conducted by way of affidavits. When an officer of the corporation deems it fit to state in no uncertain terms that he has the authority under seal to make the request for the BN in Form 4 of the said Rules, he is undertaking an official act of the company. (para 5)

(1a) There is a common law presumption (the purport of which is reflected in s. 114(e) of the Evidence Act 1950) that all official acts are deemed to be regularly performed. The statement that the officer of the corporation is authorised under seal must be accepted as true. The corporation itself in the present case had not deemed it fit to complain that the general manager had acted without its authority under

A seal. It was for the JD to provide any such evidence of such non-authority under seal and not for the corporation to reassert its position by providing further evidence. (para 5)

(2) Section 133 of the Bankruptcy Act 1967 did not state that B all judgment notices could only be applied for by an officer duly authorised under seal. It only seeks to allow acts of corporation to be considered valid where it is done by any of its officers who are authorised under the seal of the corporation. The Court of Appeal decision in *UMW Industries* C *(1985) Sdn Bhd v. Lim Chee Hian* was distinguished. (para 7)

(3) An act of issuing a BN is a means by which a corporation seeks to enforce a judgment of the court to recover its debt from the JD in the course of its business. It is purely an executive act that a responsible manager such as Puan D Normaziah should be able to undertake on her own initiative without prior approval from the corporation under seal. (para 8)

Case(s) referred to:

E *Re Haroun Al-Rashid Mohd Yusof; ex p Daya Leasing Sdn Bhd [1996] 2 CLJ 516 HC* ***(refd)***

Re Khaw Siew Suan; ex p Asia Commersial Finance (M) Bhd [2000] 8 CLJ 516 HC ***(refd)***

Re Samuel Pakianathan Jabamanickam, ex p Perwira Habib Bank (M) Bhd F *[1997] 5 MLJ 737* ***(refd)***

UMW Industries (1985) Sdn Bhd v. Lim Chee Hian (No 1) [2005] 1 CLJ 173 CA ***(dist)***

Legislation referred to:

Bankruptcy Act 1967, s. 133

G Bankruptcy Rules 1969, rr. 18, 95, Form 4

Evidence Act 1950, s. 114(e)

For the judgment creditor - Rajan Navaratnam; M/s Rajan Navaratnam

For the judgment debtor - Sallehuddin Bajuri; M/s Paul Chong & Nathan

H *Reported by Usha Thiagarajah*

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JUDGMENT

Kang Hwee Gee J:

This is my oral judgment (ex-tempore):

[1] This is an appeal against the decision of the senior assistant registrar in dismissing the judgment debtor's application to set aside the bankruptcy notice.

[2] The grounds are as follows:

1. The bankruptcy notice had failed to follow s. 133 of the Bankruptcy Act 1967 in that it fails to obtain the necessary authorisation from the bank to request for the said bankruptcy notice and hence failure to comply with the said section renders the bankruptcy notice *void ab initio*. See the Court of Appeal's decision in *UMW Industries (1985) Sdn Bhd (Dahulu dikenali sebagai UMW (Malaya) Sdn Bhd) v. Lim Chee Hian @ Lim Lek Wha (berniaga sebagai Syarikat Zalal) (No. 1)* [2005] 1 CLJ 173 at 179:

> Since the request did not comply with the provisions of s. 133 of the Bankruptcy Act and rule 215 of the Bankruptcy Rules, the request was invalid and the issuance of the bankruptcy notice pursuant to that invalid request would be null and void and also of no effect. The non-compliance of both provisions according to the respondent was not a "formal defect" but "defect in substance". In view of the fact that there was no valid request being made for the issuance of the bankruptcy notice, the bankruptcy notice issued was *void ab initio*. Without the bankruptcy notice the respondent could not commit "an act of bankruptcy". He cited the judgment of Mohamed Azmi SCJ (as he then was) in *Low Mun v. Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 at p 265:
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> > As to the principle for construing bankruptcy notices, we agree with the view that since bankruptcy is entirely the creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy.

And at 180:

> Although the request is innocent enough, the effect of the request has caused injustice to the respondent. For the above reasons, we agree with the learned counsel for the respondent and the learned judge that the defect is not curable under s. 131 of the Bankruptcy Act.

There is a duty on the part of the petitioner to furnish sufficient authority or proof that the corporation was duly authorised under seal to present the petition. See *Re Samuel Pakianathan a/l Jabamanickam, exp Perwira Habib Bank (M) Bhd* [1997] 5 MLJ 737 at 759:

> It is to be noted that in each of the cases above cited, the authority from the corporation was given to the 'officer' under seal and proof of such authority must be furnished when challenged. In the instant case, the deponents to the affidavit were clearly not authorized under seal as admitted by them. Had the respondent produced any form of authorization given to these officers under seal even if such authorization was given long ago, I could have considered it but none was produced. I would then have been inclined to follow the decision of McCardie J in *Re A Debtor (No 28 of 1917), exp The Petitioning Creditors v. The Debtor* [1917] KB 808.

Also see *Re Haroun Al-Rashid bin Mohd Yusof, exp Daya Leasing Sdn Bhd* [1996] 2 CLJ 516.

[3] The appeal is opposed on the following grounds;

1. See *Re Khaw Siew Suan; ex p Asia Commersial Finance (M) Bhd* [2001] 1 MLJ 101 at 103 held:

> (3) Objection to the notice should have been lodged at the stage of notice, not at the stage of petition. This is so because if the notice is invalid, an act of bankruptcy has not been committed and the petition is not validly filed. And the petition should not have been filed so long as an objection to the validity of the bankruptcy notice had not been ruled upon. Under the provisions of current law, after giving notice to the judgment creditor within the seven-day timeframe, the judgment debtor ought to have filed a summons-in-chambers under r. 18 to be ruled by the court. The affidavit under r. 95 (Form 7) was not valid as it was restricted to counterclaim, set-off and cross demand (see p 111 D-F).

The objection should have been made at the stage to set aside the bankruptcy notice before the issuance of the creditor's petition. Had this been done before the issuance of the hearing of the creditor's petition it would be open to the petitioner to provide the authority to justify that the officer was duly authorised under seal.

2. The present case is to be distinguished from the decision in *UMW*. There the issue was whether the officer had the necessary authority to act to issue the bankruptcy notice accepting that he had not been "authorised under seal" to do so.

3. In the present case the request for the issuance of bankruptcy notice in Form 4 states as follows: "For Standard Chartered Bank Malaysia Berhad undersigned by Normaziah bte Yaacob the Manager duly authorised under the seal of the company".

[4] Reply

1. To date no proof has been adduced to justify that the said officer was in fact duly authorised under seal of the company despite a challenge having been made in the judgment debtor's affidavit in support.

2. With reference to the case of *Re Khaw Siew Suan* referred to earlier it has no application to the present suit at hand. This is because *Re Khaw Siew Suan* dealt with the proper mode of application in setting aside a bankruptcy notice. Only the said case stated that where a judgment debtor has a counterclaim, cross demand or set-off then r. 95 of the Bankruptcy Rules of 1969 will apply. All other applications are to be made by summons in chambers pursuant to r. 18 of the Bankruptcy Rules 1969.

Findings And Decision

[5] It is pertinent to note in this case that the application by the judgment creditor's general manager Puan Normaziah had stated in Form 4 that she is authorised under the seal of the company to sign the request for the issuance of the bankruptcy notice. This in my view is sufficient to cause the senior assistant registrar to issue the bankruptcy notice. With respect I would not accept what was said obiter by Kamalanathan Ratnam JC (as he then was) that the onus was on the petitioner to provide proof that he was duly authorised. One must appreciate that the proceedings are conducted by way of affidavits. When an officer of the corporation deemed it fit to state in no uncertain terms that he had the authority under seal to make the request for the bankruptcy notice in Form 4 he is undertaking an official act of

A the company. There is a common law presumption (the purport of which is reflected in s. 114(e) of the Evidence Act 1950) that all official acts are deemed to be regularly performed. The statement that he was authorized under seal must be accepted as true. The corporation itself in this case had not deemed it fit to
B complain that Puan Normaziah had acted without its authority under seal. It is in my view that it would be incumbent upon the judgment debtor to provide any such evidence of such non authority under seal and not for the corporation to reassert its position by providing further evidence.

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[6] Secondly, the judgment of the Court of Appeal in *UMW* is concerned only with the short interpretation of s. 133 with respect to the requirement that an officer of a corporation need to be duly "authorized under seal" in order to issue a bankruptcy notice.
D If therefore an officer of a corporation chose to rely on s. 133 to provide him with the authority to act for the corporation, he would have to be authorized under the seal of the corporation.

[7] Section 133 it must be appreciated did not state that all
E judgment notices can only be applied for by an officer duly authorised under seal. It only seeks to allow acts of corporation to be considered valid where it is done by any of its officers who are authorised under the seal of the corporation. The decision in *UMW* did not go so far as to say that a request for a bankruptcy
F notice must be made only by an officer authorized under seal.

[8] An act of issuing a bankruptcy notice is a means by which a corporation seeks to enforce a judgment of the court to recover its debt from the judgment debtor in the course of its business. It is purely an executive act which a responsible manager such as
G Puan Normaziah should be able to undertake on her own initiative without prior approval from the corporation under seal.

[9] I would therefore dismiss this appeal with costs.

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